SUPREME COURT, U.S.
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No. 15-513

IN THE

Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

UNITED STATES, EX REL. CORI RIGSBY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

In arguing that enforcement of the FCA seal requirement is a matter of ordinary judicial discretion akin to enforcing any case deadline or procedural rule, respondents and the government disregard the statutory source of that requirement. Section 3730(b) of the FCA both creates a private right of action for violations of the FCA and prescribes in mandatory language the requirements for initiating a private FCA suit. A "statute which creates [a new cause of action] may also declare the purposes of its creation, and provide for the manner of its enforcement." *Pollard* v. *Bailey*, 87 U.S. 520, 526-27 (1874). Under such a statute, *Congress* creates the conditions on which a private litigant may proceed—and those conditions are not subject to optional enforcement at the will of a district court or the Executive Branch.

Respondents and the government also fail to show any persuasive reason why sealing violations should *not* result in dismissal of the relator's case. It makes no sense to suggest (Resp.Br. 21) that holding *qui tam* relators to the obligation of seal compliance will "deter[] qui tam relators from coming forward." The seal requirement is simple to comply with: keep quiet and don't leak to the press. And any such deterrent was already imposed by Congress in requiring the seal. It is equally unconvincing to suggest (Resp.Br. 34; U.S.Br. 8, 16, 31) that dismissal of the relator will confer a "windfall" on defendants. If the relator is dismissed, the *government* can intervene in a meritorious action, with its pleading relating back to the filing of the relator's complaint. Moreover, if a relator is dismissed, the government will benefit

economically because it will no longer have to pay the relator up to a 30% share. Nor will there be any "windfall" to a defendant when a relator's dismissed case has no merit. Here, contrary to respondents' suggestion (Br. 2) that this case about one flooded home involved a "massive fraud," rigorous government investigations of State Farm and other insurers after Hurricane Katrina found "*no* indication that wind damage was attributed to flooding or that flood insurance paid for wind damage." J.A.214 (emphasis added); *see* J.A.241-42.

Thus, the FCA is most sensibly read to impose a standard of mandatory dismissal when a relator violates the seal requirement, and this Court should reverse the judgment below. If the Court disagrees and holds that seal violations are subject to a discretionary standard, it should nonetheless reverse on the undisputed record here or, at a minimum, vacate and remand for reconsideration in light of this Court's guidance as to the contours of a proper test.

Under a proper test, the willfulness of FCA seal violations should be given substantial or even dispositive weight. The seal violations here were repeated, intentional and made in bad faith. Respondents' counsel Richard Scruggs, who disclosed respondents' FCA action to the national media, touted his ability to use "'every trick in the book' to gain advantage over the insurers" in the Hurricane Katrina cases. J.A.486. And contrary to the lower courts' rulings, the relators here were fully complicit in Scruggs's seal violations. As the federal district court in the parallel document-theft case ruled, "the Rigsbys were [Scruggs's] 'clients', his 'employees', his

'consultants', his 'witnesses', and his 'joint-venturers'. Scruggs and the Rigsbys were as 'joined-at-the-hip' as any set of Siamese twins." J.A.79.

Under a proper test, moreover, the severity of seal violations should be assessed *ex ante*, not *ex post* as the lower courts did in this case. Distributing the FCA evidentiary submission here to ABC, the Associated Press and the *New York Times* was unquestionably a severe disclosure. That disclosure does not become less severe merely because those national media outlets did not disseminate the existence of this suit to a broader national audience.

Under a proper test, there also should be no need to show actual harm to the government, as the lower courts required. Any such test improperly transfers control over the seal requirement from Congress to the discretion of the Executive Branch. As a practical matter, the government has little incentive to come forward and admit actual harm, and not surprisingly, has virtually never done so. The actual-harm requirement as applied by the courts below thus will consistently result in no adverse consequences to relators.

Finally, a proper test would consider harm to defendants from a seal violation as at least a relevant factor even if less substantial than willfulness and severity.

Proper application of these factors warrants reversal on the record here; at a minimum, the Court should vacate and remand with guidance enabling the courts below to weigh them properly.

ARGUMENT

I. COMPLIANCE WITH THE FCA SEAL PROVISION SHOULD BE HELD A MANDATORY PRECONDITION TO PROCEEDING WITH A *QUI TAM* ACTION

Respondents and the government would make the sanction for a seal violation purely a matter of district court discretion. That is not the statute that Congress wrote. To the contrary, the language, context and history of the FCA seal provision make clear that the filing/notice/sealing requirements of section 3730(b) are materially identical to other notice/filing requirements that this Court has held are mandatory prerequisites to proceeding with statutory private causes of action. That language, context, and history also make clear that FCA seal orders arise from the statute, unlike ordinary judicial protective orders that arise from the inherent authority of the courts. Respondents' and the government's arguments to the contrary are unavailing, as are their policy arguments.

A. The Text And Structure Of The FCA Seal Provision Show That Compliance Is A Precondition To Proceeding With A Private Suit

1. Respondents and the government fail to refute petitioner's showing that the filing/notice/sealing provision of section 3730(b) is just as much a mandatory prerequisite to proceeding with a private suit as the 60-day pre-filing notice provision at issue

in *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989). To begin with, *Hallstrom* belies respondents' suggestion (Br. 26) that, because the provision "do[es] not ... specify a consequence" for violating the seal, courts have discretion to determine an appropriate consequence. The 60-day notice provision at issue in *Hallstrom* also specified no consequence for non-compliance. *See* 493 U.S. at 26. But the Court held that dismissal for non-compliance was mandatory anyway, necessarily *rejecting* the dissent's view, *id.* at 35, that, absent an expressly stated remedy for breaching a statutory precondition to suit, a court should look to "factors extrinsic to statutory language."

Hallstrom's reasoning is fully applicable here. Congress adopted a post-filing period in the FCA for reasons specific to *qui tam* litigation—namely, so that even if the government elected to proceed with the action, the relator still would be entitled to a share of the recovery and to participate in the action. As the Senate Report on the 1986 FCA amendments states, however, "[t]he initial 60-day sealing of the allegations [under the FCA] has *the same effect* as if the *qui tam* relator had brought his information to the Government and notified the Government of his intent to sue." S. Rep. No. 99-345, 1986 WL 31937, at *24 (emphasis added).[1] Respondents and the

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[1] The government asserts (Br. 23) that the "same effect" referred to is the postponement of defendant's having to answer until the 60-day notice period or seal period ends. The Senate Report's next sentence, however, shows that the "same effect" (and the fundamental purpose of both provisions) is to give the government the necessary

government offer no authority for their argument (Resp.Br. 35-36; U.S.Br. 11) that certain magic words are necessary to make a statutory precondition mandatory. This Court has never limited mandatory statutory preconditions to those that use express language like "no action shall be commenced unless...." Rather, the Court analyzes the text, context, history, and purpose of a mandatory statutory duty to determine whether Congress intended to require dismissal for its violation. *See, e.g., John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-34 (2008).

Under that proper analysis, it makes no difference that Congress chose filing under seal with a waiting period rather than pre-filing notice with a waiting period as the precondition in the FCA. Both serve the same purpose—here as in *Hallstrom*, the private action is held in abeyance while the government exercises its right of first refusal on the suit. And both requirements have the same effect—a private plaintiff may proceed only if the plaintiff complies with Congress's preconditions. Respondents and the government thus fail to distinguish *Hallstrom* and similar cases. *See* Pet.Br. 25-27.

Respondents and the government seek to trivialize the statutory precondition here by citing various examples (Resp.Br. 26-27; U.S.Br. 17-18) designed to show that "shall" does not always mean "shall" and "must" does not always mean "must." But none of those random examples is apposite, for none

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"opportunity to study and evaluate the information in either situation." S. Rep. 99-345, 1986 WL 31937, at *24.

specifies procedures to be followed in initiating a private statutory action. Some of respondents' authorities, for example, concern statutory *timing* deadlines for action by the courts or government agencies.[2] But this Court has expressly distinguished such timing deadlines from mandatory procedural prerequisites to suit. *See Hallstrom*, 493 U.S. at 27 (distinguishing *Zipes* v. *Trans World Airlines*, 455 U.S. 385 (1982)); *John R. Sand & Gravel*, 552 U.S. at 133 (distinguishing ordinary timing provisions from provisions that serve "a broader system-related goal"). Other decisions cited by respondents (Br. 37-39) are equally inapposite, holding that certain formalities were inessential to the mandatory requirement in question.[3] In sharp contrast, the

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[2] *See Dolan* v. *United States*, 560 U.S. 605 (2010) (deadline for district courts' restitution determinations); *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990) (deadline for detention hearing); *Brock* v. *Pierce Cnty.*, 476 U.S. 253 (1986) (deadline for administrative determination).

[3] For example, in *United States for Use & Benefit of Alexander Bryant Co.* v. *N.Y. Steam Fitting Co.*, 235 U.S. 327, 341 (1914), the Court held merely that a one-year filing deadline could be reconciled with a requirement of notice to other claimants three months before that deadline, even if a timely-filed case thus could lack timely notice, because notice was "not of the essence of jurisdiction over the case." Similarly, in *Fleisher Engineering & Construction Co.* v. *United States for Use & Benefit of Hallenbeck*, 311 U.S. 15, 18-19 (1940), the Court held only that a provision specifying the method of service was not "mandatory so as to deny right of suit when the

procedural requirement here (as in *Hallstrom*) is essential to the private right of action and was deemed by Congress to be a necessary balance to the statutory incentives for *qui tam* actions provided in the 1986 FCA amendments. *See* Pet.Br. 35-37.

2. Respondents and the government further err, disregarding *Hallstrom*, in arguing (Resp.Br. 40-41; U.S.Br. 18) that the placement of the FCA seal provision in the same subsection that creates a private right of action is without significance. In finding in *Hallstrom* that RCRA's 60-day notice requirement was a "mandatory, not optional" precondition to suit, this Court emphasized that the 60-day notice provision was expressly incorporated in the statutory provision that created a cause of action. 493 U.S. at 26; Pet.Br. 25.[4]

Moreover, in the 1986 amendments to the FCA, Congress carefully structured the FCA, providing indicative headings. Respondents and the government incorrectly stress (Resp.Br. 40; U.S.Br. 11-12) that the seal provision is not included in subsection 3730(e) ("Certain actions barred"), but is located under the heading "Actions by private persons." That location does not make the seal

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required written notice within the specified time had actually been given and received."

[4] *Cf. Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 429 (2011) (placement of appeal deadline "in a subchapter entitled 'Procedure,' and not in the subchapter entitled 'Organization and Jurisdiction,'" "suggest[s] Congress regarded the 120-day limit as a claim-processing rule," subject to exceptions).

provision any less mandatory. To the contrary, location of a procedural requirement within the subsection creating the private right of action makes it more clearly a mandatory precondition to suit. *See Hallstrom*, 493 U.S. at 31; *Pollard*, 87 U.S. at 527; *Mach Mining, LLC* v. *E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015).

Respondents also erroneously assert (Br. 40-41) that *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 159 n.6 (2003), rejected this "location-based argument." *Barnhart*, however, concerned merely an administrative timing directive (*see supra* 7 & n.2) that was not a prerequisite for any later action and that was not located in a provision creating a private right of action. *See* 537 U.S. at 158-59. It has no relevance here.

3. Citing section 3730(b)(4) & (c)(3), respondents argue (Br. 22, 42) that the relator's right to conduct the action is conditioned only "on the government's decision not to intervene" and that courts may not "imply additional conditions." The cited provisions, however, do not relate to the private right of action, but govern a relator's role in conducting the litigation. The statute's limitations on a relator's role in the litigation have no bearing on whether the statute's requirements of filing and maintaining a private FCA action under seal are a mandatory precondition to the right to pursue such an action. Nor is obeying the seal an implied condition. It is a direct statutory command to relators who want to bring a private action.

4. Respondents and the government also fail to refute petitioner's showing that the assignor/assignee relationship between the government and the relator supports strict enforcement of the FCA seal requirement.[5] Respondents are incorrect to assert (Br. 42-43) that the FCA gives the Executive Branch discretion to "accept[]" or acquiesce in respondents' failure to comply with the conditions of the assignment. In section 3730, *Congress* set out the specific rights and duties of the government and the relator with respect to initiating, conducting, and (for the government) intervening in, a private FCA suit. Congress could have specified that a *qui tam* complaint be "filed under seal to be maintained at the pleasure of the Attorney General," but it did not. The conditions for assignment were set by Congress, and there is no provision permitting the Executive Branch to authorize or accept breaches of the seal at its discretion. *Cf. Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 613-14 (1981) (statutory assignment of longshoremen's claims does not permit judicially-fashioned exceptions).

Furthermore, contrary to respondents' suggestion (Br. 43), Congress viewed observance of the seal as a *material* requirement of the assignment, as shown by the statutory language and legislative history. *See* Pet.Br. 21-27, 34-35. In protecting the government's

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[5] Respondents err in contending (Br. 41) that State Farm waived this argument in support of its claim that dismissal is required for breaches of the seal. *See Yee* v. *Escondido*, 503 U.S. 519, 534 (1992) ("any argument" may be made to support "properly presented" claim; "parties are not limited to the precise arguments they made below").

investigation of an FCA claim and its decision whether to intervene, the seal provision enacted by Congress serves not merely the Executive Branch's prerogative but a "broader system-related goal." *John R. Sand*, 552 U.S. at 133. Such mandatory preconditions should not be excused at the courts' *or* the Executive Branch's discretion.

B. The Seal And Extensions Of The Seal Are Statutory Orders, Not Judicial Orders Subject To A Court's Ordinary Discretion

Respondents and the government further err in treating statutory FCA sealing orders as merely a species of ordinary *non*-statutory judicial seals. To begin with, respondents err in relying (Br. 29) on the fact that Congress used the phrase "under seal," which respondents claim has a "well-settled meaning to attorneys and judges." To the contrary, the term "under seal," unlike the term "property" in the Hobbs Act, *see Sekhar* v. *United States*, 133 S. Ct. 2720, 2724-25 (2014), does not import a rich historical context from the common law. This case more closely resembles *Ross* v. *Blake*, 136 S. Ct. 1850 (2016), which held that "judge-made exhaustion doctrines" stand "on a different footing" from "statutory exhaustion provision[s]." *Id.* at 1857. While judges may make exceptions to judge-made exhaustion doctrines, *Ross* held that, as to statutory exhaustion provisions, "Congress sets the rules–and courts have a role in creating exceptions only if Congress wants them to." *Id.* (holding that a statutory exhaustion provision employing the term "shall" "foreclos[ed] judicial discretion" and required dismissal for failure to

comply).[6] Here, also, Congress set the rules, and the courts are limited to those rules.

Here, there is nothing in the statutory language or history to suggest that Congress intended the district courts to exercise ordinary discretion under their inherent authority in determining the consequence for FCA seal violations. The statutory language requires that the seal be maintained for at least 60 days and for a longer period if the government establishes good cause. Congress could have written the statute to say "shall be filed under seal for such period as the district court shall determine appropriate"—but it did not. The statute it did write affords no discretion.

Respondents and the government err further in suggesting (Resp.Br. 23; U.S.Br. 14) that an *extension* of the FCA seal period is created purely by judicial order even if an initial sealing order is not. The statute itself provides authority for extensions of the seal under subsection (b)(3), and that subsection expressly provides that, upon extension, "the complaint remains under seal *under paragraph (2)*"—the provision governing the initial seal. 31 U.S.C. 3730(b)(3) (emphasis added). Thus, Congress made

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[6] *See also Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162 (2008) (rejecting argument that section 10(b) of Securities Act "incorporate[s] common-law fraud into federal law": "'Even assuming ... a deeply rooted background of aiding and abetting tort liability, it does not follow that Congress intended to apply that kind of liability to the private causes of action in the securities Acts'").

clear that a seal extension is just as much a statutory command as an initial seal. Neither is merely a non-statutory judicial order.

Accordingly, respondents' assertion (Br. 23) that "this case does not involve a statutory violation—it only involves the violation of a court order" is incorrect. Respondents' admitted violations of the seal after its extension were breaches of the statute, requiring dismissal.

C. Respondents' And The Government's Policy Arguments Are Not Well Founded

Respondents and the government provide no support for their speculation (Resp.Br. 21; U.S.Br. 14-15) that relators might be deterred from filing meritorious *qui tam* cases by enforcement of the seal requirement through mandatory dismissal. Nor could they. Compliance with a seal order is not difficult or burdensome. It requires no affirmative action by relators. It requires only that relators refrain from publicizing their suit.[7]

Nor do respondents or the government provide any support for their repeated insistence (Resp.Br.

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[7] Any concern (Resp.Br. 21; U.S.Br. 14-16, 23) about over-deterrence through dismissal for *de minimis* disclosures may be avoided by sensible construction of what constitutes a seal breach. Trivial disclosures may "not rise to a breach of the seal." *United States ex rel. Gale* v. *Omnicare, Inc.*, 2013 WL 2476853, at *4 (N.D. Ohio June 7, 2013) (comments to wife not a breach).

22, 31, 34, 39; U.S.Br. 16, 31) that strict enforcement of the FCA seal requirement will cause "windfalls" for defendants or unduly burden government resources if the government intervenes to pursue a dismissed relator's claim. Respondents themselves have argued (Opp.Br. 18) that "[o]nly a small percentage of FCA cases involve an alleged seal violation." Thus, the incidence of any "windfalls" or government burdens from dismissal for seal violations will be low to begin with. Of that small sliver of cases, moreover, there is no reason to assume that many will have merit. Approximately 95% of intervened cases result in a settlement or judgment for the government, while only 6% of non-intervened cases do.[8] Thus, merit is directly correlated with government intervention, and if the government has intervened, it has already undertaken to expend government resources in the case. And as the Justice Department has testified before Congress, it "dedicat[es] the resources necessary to investigate [false claims] allegations," "litigat[es] the meritorious cases vigorously," and has "75 full-time attorneys in the Civil Division responsible for [FCA] cases" and "scores of" AUSAs.[9]

Other policy arguments advanced by respondents and the government are also meritless. In particular, respondents incorrectly contend (Br. 34) that the

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[8] *See* Fraud Statistics *Qui Tam* Intervention Decisions & Case Status As of September 30, 2010, U.S. Department of Justice, *available at* http://www.friedfrank.com/files/QTam/DOJ2010statsquitam.pdf.

[9] https://www.judiciary.senate.gov/imo/media/doc/hertz_testimony_02_27_08.pdf.

government will be hampered by statute-of-limitations problems if it attempts to intervene after a relator's *qui tam* suit is dismissed late in a litigation for failure to maintain the seal. In fact, the FCA provides that, if the government elects to intervene in a *qui tam* action, its pleading "shall relate back to the filing date" of the relator's complaint. 31 U.S.C. 3731(c). Given the government's ability to intervene if it believes an FCA claim has merit, respondents and the government are incorrect to suggest that enforcing the seal will result in "windfalls" to defendants in meritorious cases.

II. ALTERNATIVELY, UNDER ANY PROPER DISCRETIONARY STANDARD, THE DECISION BELOW SHOULD BE REVERSED OR VACATED

Even if this Court rejects a mandatory dismissal standard for FCA seal violations, it should reverse or vacate under any appropriate discretionary standard.[10] On the undisputed record, respondents'

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[10] Contrary to the government's assertion (Br. 28), State Farm did not waive the issue of the "[mis]application of the multi-factor standard to the facts of this case." The petition sought review (Pet. 17-19, 26-28) of both the lower court's discretionary test and its proper application. The question presented encompasses both defining the proper standard governing dismissal for a relator's seal violation and explicating its application. *See* Sup.Ct.R. 14.1(a); *Yee*, 503 U.S. at 534. And contrary to respondents' assertion (Br. 45-46), petitioner's Fifth Circuit brief did not waive issues of harm to the defendant's reputation and potential

counsel engaged in repeated and willful violations of the seal requirement designed to turn public opinion against State Farm. Respondents were complicit in, and benefitted from, those repeated intentional violations. And yet, under the rulings below, relators will suffer no consequence for those violations.[11] At a minimum, this case merits vacatur and remand for reconsideration under this Court's guidance.

A. Willfulness Should Have Substantial Or Dispositive Weight

Respondents and the government do not dispute that, of the equitable principles that historically have guided the kind of judicial discretion over sanctions they advocate, none is more fundamental than that willful violations of the law should get "the severest sanction." *Taylor* v. *Illinois*, 484 U.S. 400, 417 (1988). In other contexts, bad faith plays a critical role in determining whether dismissal is the proper sanction for misconduct. *See* Pet.Br. 43-44 (citing cases). Here, the court of appeals entirely discounted the bad-faith conduct of respondents and Scruggs in intentionally

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harm to the government. *See* C.A. Cross-Appellant's Br. 67, 69.

[11] The alternative sanctions respondents and the government hypothesize (Resp.Br. 31-32; U.S. Br. 10, 16, 23-24) are illusory here. No "attorney discipline" can be imposed on Scruggs, who, for reasons other than the seal violations, withdrew from respondents' case and was later disbarred. J.A.17. Nor were monetary sanctions imposed on respondents. Respondents and the government cite only a single case (Resp.Br. 31; U.S.Br. 23-24) where a relator's award was reduced for a seal violation.

and repeatedly violating the seal provision. Under any proper balancing test, such bad faith alone should count as a strong or even dispositive factor in favor of dismissal.

Respondents' suggestion (Br. 52-53) that they should not be held to account for willful seal violations by their counsel contravenes the long-recognized principle that parties are responsible for their attorneys' actions. *See, e.g.*, *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd.*, 507 U.S. 380, 397 (1993); *Taylor*, 484 U.S. at 418; *Maples* v. *Thomas*, 132 S. Ct. 912, 922 (2012). Respondents here should not be allowed to "avoid the consequences of the acts or omissions of this freely selected agent." *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962). "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent." *Id.*

Moreover, the unambiguous record precludes the Rigsbys' efforts to wash their hands of Scruggs. Far from being innocent bystanders, "the Rigsbys and Scruggs" were "aiders and abetters of each other," as the district court found in the parallel document-theft action brought against the Rigsbys by their employer Renfroe. J.A.85. "[T]he Rigsbys were [Scruggs's] 'clients', his 'employees', his 'consultants', his 'witnesses', and his 'joint-venturers'. Scruggs and the Rigsbys were as 'joined-at-the-hip' as any set of Siamese twins." J.A.79. Thus, "Scruggs was the *alter ego* of the Rigsbys, and the Rigsbys were the *alter egos* of Scruggs. They could not have been any more

closely 'identified' without obtaining a marriage license." J.A.82.

Respondents incorrectly argue (Br. 53) that Scruggs was acting adversely to their interests, violating the seal to advance other Hurricane Katrina litigation. Respondents, however, each had an interest in receiving "their ill-gotten gains" of $150,000 a year as sham "'consultants' for [Scruggs's] law firm in connection with hurricane damage claims." J.A.16, 93. Moreover, the district court found it "'abundantly clear" that, beyond benefitting his homeowners' suits, Pet.App. 68a, Scruggs "'used formidable public relations resources ... in an effort to control the public perception of the issue at the heart of this *qui tam* action, i.e., whether State Farm deliberately mischaracterized wind damage as flood damage in assessing claims under the insurance policies it was adjusting.'" J.A.57. "[T]he Rigsby sisters' allegations" were "a big part of his lawsuits." J.A.389. Respondents stood to profit in multiple ways through the strategic seal violations that fueled the media campaign. And respondents were willing participants in that campaign: they discussed State Farm's purported fraud with Representative Taylor, granted media interviews, and collaborated in photo shoots. Pet.Br. 8-9, 11-12.

B. Severity Should Be Assessed By The Character, Not The Consequences, Of A Seal Violation

Respondents and the government agree (Resp.Br. 45; U.S.Br. 24) that the severity of a relator's seal violation is an appropriate factor in any discretionary

test. Neither disputes that the nature and extent of a seal violation should determine its severity. Both suggest nonetheless (Resp.Br. 2; U.S.Br. 29) that the disclosures here were "limited" or "relatively minor" because they supposedly "did not reveal this lawsuit to the public at large or tip off State Farm." That suggestion commits a classic *ex post/ex ante* fallacy. The severity of the violation should be assessed in light of the relators' intended goal in the dissemination, not in light of whether or not that goal was achieved after the fact.

Here, respondents repeatedly disclosed the existence of their FCA suit to major national media—any of which could have broadcast the sealed information to the public. It is fortuitous that they did not do so. In any event, ABC, AP, and the *New York Times* "must be considered ... member[s] of the public." *E.E.O.C.* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 603 (1981). And in February 2007, while the seal was in effect, Congressman Taylor publicly announced the existence of this suit. J.A.548; Pet.Br. 11-12, 59-60.

Nor is a post-filing seal violation by definition less severe than a failure to file under seal in the first place, as respondents and the government suggest (Resp.Br. 17, 19; U.S.Br. 29). The text of the FCA does not support this "illusory" distinction. *United States ex rel. Summers* v. *LHC Grp., Inc.*, 623 F.3d 287, 295 (6th Cir. 2010); Pet.Br. 49-50. Its adoption would free relators to engage in abuses confident that nominally filing under seal will spare them any meaningful sanction.

C. No Demonstration Of Actual Harm To The Government Should Be Required

While the government agrees (Br. 25) that dismissal may sometimes be warranted in the absence of "demonstrated harm to the government," respondents advocate (Br. 46-47) the "'no harm, no foul' balancing test," *Smith* v. *Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015), that the Ninth Circuit adopted in *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 67 F.3d 242, 245-47 (9th Cir. 1995). This Court should reject that test, which effectively treats actual harm to the government as a prerequisite to any dismissal.[12] As the government acknowledged in *Lujan*, it is "'difficult, if not impossible, to determine'" the actual harm that a seal violation might have caused the government. 67 F.3d at 246 (citation omitted); *see Summers*, 623 F.3d at 298; Chamber Br. 11-12; WLF Br. 11-12. State Farm has found only one case in the last 30 years in which the government informed a district court that it suffered actual harm from a seal violation. *United States ex rel. Le Blanc* v. *ITT Indus., Inc.*, 492 F. Supp. 2d 303, 307-08 (S.D.N.Y. 2007).

Respondents err in asserting (Br. 47) that lack of harm to the government may be *presumed* based on Congress's statement that seal violations would "not

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[12] Courts applying *Lujan* routinely focus on actual harm to the government as the dominant factor. *See, e.g.*, *United States ex rel. Ruscher* v. *Omnicare, Inc.*, 2015 WL 4389644, at *2-3 (S.D. Tex. July 15, 2015) (finding no "harm to the government meriting dismissal," notwithstanding "bad faith" disclosures).

'often interfere with sensitive investigations'" (quoting S. Rep. 99-345, 1986 WL 31937, at *24). This statement does not support a requirement of actual harm to the government, much less a presumption of no harm. Rather, it indicates the importance to Congress of deterring *all* seal violations as essential to preventing interference with sensitive investigations. Respondents likewise err in suggesting (Br. 46) that only defendants' hidden actions like "shredding documents" can harm the government. Here, as late as July 2007 (months after the purported mooting of the seal), the government requested that the seal remain in place to avoid interference between civil and criminal investigations. J.A.123, 125, 187. As the government explained, prematurely lifting the seal "would require the Government to make an immediate decision as to whether or not to intervene in this matter, and the Government is not adequately prepared to make that election at this time." J.A.188 (citation omitted). *See United States ex rel. Pilon* v. *Martin Marietta Corp.*, 60 F.3d 995, 999 (2d Cir. 1995) (seal violations may eliminate "settlement value" arising from sealed status).

Given the difficulties of establishing actual harm to the government, a test that emphasizes actual harm and minimizes potential harm will result in inadequate sanctions and under-deterrence.

D. Harm To The Defendant Should Be Considered A Relevant Factor

Contrary to respondents' contentions (Br. 48-50), one of the "purposes" of the seal requirement is "'to

protect the reputation of a defendant,'" and any discretionary test should account for this purpose in weighing an appropriate sanction for a violation. *Smith*, 796 F.3d at 430 (citation omitted); *accord Pilon*, 60 F.3d at 999; Chamber Br. 15-17; Coalition Br. 6-9; WLF Br. 16-20; DRI Br. 11-16; NACDL Br. 3-6, 8-11. Respondents and the government urge (Resp.Br. 50; U.S.Br. 27) that this case presents no issues of reputational harm. These arguments overlook the findings below that "formidable public relations resources" were used "to control the public perception" against State Farm. J.A.57; Pet.Br. 57; ATRA Br. 19-20.

Taking all these factors together, or based on willfulness alone, this Court should give guidance in future cases as to the contours of any proper balancing test by finding that the district court abused its discretion here in denying dismissal. At a minimum, the decision affirming that denial should be vacated and the case remanded.

III. THE LOWER COURTS COMMITTED PLAIN ERROR IN EXCLUDING THE 2007 SEAL VIOLATIONS[13]

The seal was not lifted until August 2007. J.A.11-

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[13] Respondents and the government incorrectly assert (Resp.Br. 57; U.S.Br. 33) that the question presented does not include this issue. But the petition made clear that this issue was part of the lower courts' misapplication of the discretionary factors. *See* Pet. 11 & n.6. Thus, the issue is a "subsidiary question fairly included" in the question presented. Sup.Ct.R. 14.1(a). Moreover, the issue

12. As late as May 29, 2007, respondents asserted that "the seal has remained patent." J.A.176. On July 24, 2007, the government asserted that the seal remained intact and should not be lifted. J.A.187-90. The district court nonetheless concluded *sua sponte* (Pet.App. 63a) that the January 2007 order partially lifting the seal rendered the seal moot. Respondents and the government fail to salvage that erroneous decision. Contrary to their suggestions (Resp.Br. 57; U.S.Br. 33 n.4), the district judge who interpreted the January 2007 order was not the magistrate judge who issued it, and his interpretation of the order merited no special deference. In any event, that order did not "moot" the seal. Pet.Br. 10-11, 58-59.

Nor was the court of appeals correct in *sua sponte* finding the seal "effectively mooted" (Pet.App. 21a) for a different reason—a January 2007 filing in *Renfroe* that speculated about the "likelihood" of a suspected *qui tam* action. *E.A. Renfroe & Co.* v. *Rigsby*, No. 2:06-cv-01752, ECF No. 85, at 2 (N.D. Ala. Jan. 18, 2007). It was plain error to conclude that such speculation moots an FCA seal. *See* Pet.Br. 15, 59.

These errors were prejudicial because the 2007 seal violations were especially egregious. Congressman Taylor publicly stated in February 2007 that "[t]he Scruggs Law Firm represents the [Rigsby] sisters in a *False Claims Act* filing against State Farm and Renfroe." J.A.548; *see* Pet.App. 48a-56a; Pet.Br. 11-12, 59-60. Yet Renfroe was not named as a defendant until May 2007. J.A.129. Thus, the only

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may be considered by the Court as a plain error. Sup.Ct.R. 24.1(a).

way Taylor could have learned this information was from respondents or their then-lawyers. WLF Br. 23.[14]

Contrary to respondents' contentions (Br. 57-59), this disclosure to Congressman Taylor and respondents' counsel's emailing the sealed first amended complaint to CBS News in June 2007 (Pet.Br. 12) constituted disclosures to "member[s] of the public," *E.E.O.C.*, 449 U.S. at 603, and violated the seal. Respondents' 2007 seal violations should be considered on any remand.

IV. DEFENDANTS HAVE STANDING TO RAISE VIOLATIONS OF THE SEAL

Finally, respondents err in their newly-raised contention (Br. 54-56) that defendants lack standing to raise seal violations. Respondents did not make this argument in the district court (SF C.A.Reply Br. 28), the issue was not passed on by the court of appeals (Pet.App. 22a n.9), and respondents failed to raise it in opposing certiorari. Accordingly, the issue is waived. *See* Sup.Ct.R. 15.2; *Nevada Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117, 129 (2011).

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[14] Scrugg represented Congressman Taylor in a Katrina-related lawsuit. Pet.Br. 9 n.2. Respondents incorrectly assert (Br. 58) that disclosures to Taylor were permitted as part of the statutorily-required disclosures to the government. Section 3730(b)(2) requires service on the government pursuant to Fed.R.Civ.P. 4(i)(1), *i.e.*, the appropriate U.S. Attorney and the Attorney General.

Respondents' argument also lacks substantive merit. In this Court's decisions on statutory prerequisites to suit, the issue of noncompliance has been raised by defendants. *See, e.g.*, *Mach Mining*, 135 S. Ct. at 1650; *Hallstrom*, 493 U.S. at 307; *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157, 158-59 (1914). Respondents cite no decision holding that defendants lack standing to raise an FCA seal violation.

Further, "Article III does not restrict [a defendant's] ability to object to relief being sought at its expense." *Bond* v. *United States*, 564 U.S. 211, 217 (2011). Respondents' cases (Br. 54-55) are inapposite: *Warth* v. *Seldin*, 422 U.S. 490, 493-94 (1975), and *Kowalski* v. *Tesmer*, 543 U.S. 125, 128 (2004), both address plaintiffs' standing—not the ability of defendants to raise a statutory violation as a defense. *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978), held that a defendant could not assert a third person's Fourth Amendment right to exclude evidence, as a matter of "substantive Fourth Amendment law" rather than "standing." Respondents' standing objection is frivolous.

CONCLUSION

The judgment of the court of appeals should be reversed or, at a minimum, vacated and remanded.

Respectfully submitted,

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